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In the Supreme Court of the United States

OCTOBER TERM, 1978

JULIAN S. H. WEINER AND SOLOMON BLOCK,
PETITIONERS

v.

UNITED STATES OF AMERICA

MARVIN A. LICHTIG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 578 F.2d 757.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1978. In both cases petitions for rehearing were denied on July 21, 1978, and the petitions for a writ of certiorari were filed on August 19, 1978 (Pet. No. 78-281) and August 21, 1978 (Pet. No. 78-284). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's instructions to the jury that circumstantial evidence could be considered on the issue of intent were correct.

2. Whether the trial judge coerced the jury by giving a modified *Allen* instruction after five days of deliberation in response to the jury's statement that one juror wanted to end her participation in the deliberations.

3. Whether the district court erred in denying a motion for a new trial based upon a juror's statement made after the jury had been discharged, impeaching the unanimity of the verdict (Pet. No. 78-281 only).

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[1] "Pet. App." refers to the appendix to the petition in No. 78-281.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted on multiple counts charging violations of the securities laws, 15 U.S.C. 77f, 77q (a), 77x, 78*l*, 78m, and 78ff.[2] Each petitioner was sentenced to concurrent two-year terms of imprisonment on each count, all but three months of which were suspended, to be followed by a four-year period of probation. The court of appeals affirmed in a comprehensive opinion (Pet. App. 1-100).

The trial evidence is detailed in the opinion of the court of appeals. In outline, it showed that petitioners knowingly participated in a scheme lasting nearly a decade (1964-1973) to increase the market value of Equity Funding Corporation of America (EFCA) stock by fraudulently misrepresenting EFCA's income, assets, and liabilities on financial statements filed with the Securities and Exchange Commission and various exchanges. More particularly, from 1961 through 1972 petitioners, members of an independent accounting firm (Wolfson, Weiner), were responsible for auditing EFCA's books and certifying its financial statements.[3] Contrary to generally accepted

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[2] Weiner was convicted on ten counts; Lichtig was convicted on 13 counts; Block was convicted on seven counts and acquitted on two counts (Pet. App. 3-4).

[3] Petitioner Weiner, a lawyer and certified public accountant (CPA), was in charge of the EFCA audits from 1961 to 1973. Petitioner Lichtig, a CPA, supervised the audit field work from 1963 to 1968. In 1969 Lichtig became EFCA's Treasurer

auditing procedures, petitioners failed to verify multi-million dollar overstatements of EFCA's assets and income. Furthermore, petitioners prepared and certified financial documents that contained material false statements and concealed the improper manipulation of various accounts (10 Tr. 1682-1752; 11 Tr. 1816-1866, 1911-1961; 12 Tr. 2282; 21 Tr. 155-156, 175; 26 Tr. 19-21; 27 Tr. 1594-1636; 34 Tr. 1157-1166; 41 Tr. 2327-2328, 2358; 44 Tr. 2781-2830, 3032-3035; 46 Tr. 3143-3147).

After petitioner Lichtig became EFCA's Treasurer in 1969, he made fictitious entries to asset and income accounts and signed fraudulent reports to the SEC.[4] Moreover, at a meeting with petitioner Weiner and others involved in the fraud, Lichtig disclosed that an asset had been inflated by $10 million in a single year and discussed how that would be concealed on financial statements (17 Tr. 145-157; 19 Tr. 48-51; 27 Tr. 336-344; 28 Tr. 47-70; 33 Tr. 967-968; 34 Tr. 1176-1177). Subsequently, Weiner devised an improper accounting procedure as a result of which $17 million in uncertain receivables was reported as a current asset. Petitioner Block acquiesced in that fraud and similarly overlooked the massive inflation

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and petitioner Block, an accountant, took over his audit responsibilities (10 Tr. 1708-1710; 11 Tr. 1873-1874; 21 Tr. 155-156, 175; 26 Tr. 19-21; 41 Tr. 2327-2328, 2358; 44 Tr. 2800-2812, 2828-2830, 3032-3035; 47 Tr. 3234-3235).

[4] While Lichtig was associated with Wolfson, Weiner, the purportedly independent auditor of EFCA, he held hidden stock interests in EFCA worth over $100,000 (7 Tr. 1152-1166; 10 Tr. 1754-1769; 25 Tr. 914, 922-930).

of other asset accounts. Block also played a key and deliberate role in covering up an $8-10 million discrepancy in EFCA's accounts that had been discovered by subordinate auditors (15 Tr. 110-111; 17 Tr. 163-195; 19 Tr. 41-43; 22 Tr. 195-196, 216-221, 260-261, 298-306; 28 Tr. 85-97, 167-182; 34 Tr. 1178-1185, 1192-1201; 35 Tr. 1248-1249; 37 Tr. 1603-1615; 38 Tr. 1798-1803).

The fraud at EFCA continued until it was discovered in 1973. By then, the company's financial statements, for which petitioners had responsibility, claimed over $100 million in assets that did not exist (27 Tr. 1594-1636; 38 Tr. 1814-1817).

ARGUMENT

1. All petitioners contend that the jury instructions on criminal intent were improper under *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), alleging that the instructions permitted convictions for securities fraud violations upon less than fraudulent intent (78-281 Pet. 27-37; 78-284 Pet. 12-20).

This position mischaracterizes the court's instructions.[5] The trial court plainly instructed the jury

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[5] These instructions, in pertinent part, were as follows (61 Tr. 5247-5248):

> It is not enough, of course, merely to establish that a given defendant acted negligently or through error or mistake. Under our system of laws men are not punished criminally for mere mistakes in judgment, mismanagement, carelessness, negligence, or errors of judgment. They are punished only for intentional wrongdoing. The defendants are not on trial here for errors of judgment or

that defendants could be "punished only for intentional wrongdoing" and that "an essential element of [the] offense is an evil or criminal intent, which it is incumbent upon the government to prove to your satisfaction and beyond a reasonable doubt * * *."

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mistakes or mismanagement or negligence, but are on trial for a criminal offense, and an essential element of that offense is an evil or criminal intent, which it is incumbent upon the government to prove to your satisfaction and beyond a reasonable doubt before you will be warranted in returning a verdict of guilty.

The defendants argue that they acted in good faith in their activities relating to Equity Funding. Good faith, that is to say, an honest belief in the truth of the statement made, would constitute a complete defense here.

If the evidence in the case leaves you with a reasonable doubt as to whether the accused in good faith believed the financial statements, auditors' certificates, and other written statements to be true at the time they were made, then you should acquit the accused.

While I have stated that negligence or mistake does not constitute guilty knowledge or intent, nevertheless, ladies and gentlemen, you are entitled to consider in determining whether a defendant acted with such intent if he deliberately closed his eyes to the obvious or to the facts that certainly would be observed or ascertained in the course of his portion of the accounting works, or whether he recklessly states as facts matters of which he knew he was ignorant.

If you find such reckless, deliberate indifference to or disregard for truth or falsity on the part of a given defendant when considered in the light of all other evidence relating to intent, you may, but you need not necessarily, infer therefrom that such defendant acted willfully and knowingly. Such an inference, of course, depends upon the weight and credibility extended to the evidence of reckless and indifferent conduct, if any.

The court further instructed the jury that good faith or mere negligence would be an absolute defense.

It is true that the instructions, in requiring the jury to find that the defendants had an intent to defraud, permitted the jury to consider circumstantial evidence on the issue of intent: "[Y]ou are entitled to consider in determining whether a defendant acted with such intent if he deliberately closed his eyes to the obvious or to the facts that certainly would be observed or ascertained in the course of his portion of the accounting works, or whether he recklessly states as facts matters of which he knew he was ignorant" (61 Tr. 5248). The court carefully followed this passage, however, with an instruction that an inference of guilty knowledge from such deliberately reckless conduct was merely a permissible inference to be considered under all the circumstances and was not an inference required to be drawn (*ibid.*).

"[C]ourts and juries every day pass upon knowledge, belief and intent—the state of men's minds—having before them no more than evidence of their words and conduct, from which, in ordinary human experience, mental condition may be inferred." *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 411 (1950). Accord, *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954); *Smith* v. *California*, 361 U.S. 147, 154 (1959). The instruction below was in this tradition—steadfastly requiring for conviction a finding beyond all reasonable doubt that the defendants in fact intended to defraud but permitting, yet not requiring, the jury to consider, as circumstantial

evidence of such intent, the defendants' reckless and deliberate disregard for the obvious. In requiring a finding of scienter, the instruction is fully consistent with *Ernst & Ernst* v. *Hochfelder*.

For the same basic reason, there is no merit in petitioners' objection to the court's instruction that defendants' failure to follow generally accepted auditing standards and generally accepted accounting principles ("GAAS" and "GAAP") was relevant to the issue of intent.[6] During the trial, as the court of

[6] The instruction was as follows (61 Tr. 5243-5245):

> One circumstance you are entitled to consider and weigh in determining whether the defendants Weiner, Lichtig, and Block acted willfully and knowingly while in their capacities as independent accountants in relation to Equity Funding is whether they followed or deviated from generally accepted auditing standards or accounting principles in effect at the times here pertinent.
>
> For example, in this case you may recall evidence of certain accounting principles or auditing standards which were talked about.
>
> The government points to evidence which they say establishes that, at various times each of the defendants deviated from sound accounting principles and auditing standards.
>
> Evidence on this issue is not conclusive, however, on the overriding issue of the defendant's [*sic*] knowledge and intent. The weight and credibility to be extended by you to such proof must depend, among other things, on the weight you give to the opinion evidence offered by the Governments' [*sic*] witnesses.
>
> Generally, when a certified public accountant is engaged to perform an independent audit for a corporation such as Equity Funding, he represents and warrants that he will perform the audit and other accounting work in accordance with generally accepted auditing standards and generally accepted accounting principles and that he will render an opinion as to whether the financial statement of the company fairly represents its financial position and the results of its business operation.
>
> Proof, if any, that any of these defendants departed from such standards of auditing and accounting as were then applicable or participated in the preparation or approval of an audited financial statement that did not fairly present Equity Funding's financial position is evidence, though not necessarily conclusive evidence, that the individual defendant involved did not act honestly or in good faith, and that the financial statement prepared contrary to such standards may have been materially false or misleading.

appeals observed, several witnesses testified that many practices used by the defendants violated such practices and standards (17 Tr. 156-157, 193-195; 34 Tr. 1165, 1176-1177, 1194-1200; 22 Tr. 210-211, 308-311; 23 Tr. 464-465, 510-512; 35 Tr. 1304-1309; 38 Tr. 1839-1841 and Govt. Exh. 350). The judge's instruction was merely that these violations were relevant circumstantial evidence on the issue of intent and that the weight to be given the violations was up to the jury. The remainder of petitioners' argument on this point—that petitioners indeed complied with these standards—is a factual argument that does not warrant review by this Court.

2. Petitioners' contention (78-281 Pet. 20-26; 78-284 Pet. 8-11) that the trial judge coerced the verdict by giving a modified *Allen* charge is without merit. After five days of deliberations, the jury informed the court that one of its members did not wish to participate further in the deliberations (61

Tr. 5271-5275). Following the delivery of a modified *Allen* instruction, the jury continued its deliberations for about an hour and was then excused for a four day recess period. Thereafter, the jury returned for two days of deliberations, after which the verdict was returned (61 Tr. 5276-5283).

To determine whether the trial court's *Allen* charge coerced the jury, both the trial court's language and the facts and circumstances forming the context for the court's remarks must be examined. *Jenkins* v. *United States*, 380 U.S. 445 (1965); *United States* v. *Skinner*, 535 F.2d 325, 326 (5th Cir. 1976) (per curiam), cert. denied, 429 U.S. 1048 (1977); *United States* v. *Cheramie*, 520 F.2d 325, 328-332 (5th Cir. 1975). As the court of appeals correctly concluded (Pet. App. 8), in the circumstances of this case "the supplemental instruction was not coercive."

The court gave the supplemental charge after the jury deliberated for five days without a verdict and after the court determined that a shorter supplemental instruction would likely have been ineffectual (61 Tr. 5268, 5271). In its charge, the court, while stating *inter alia* that this case, "[l]ike all cases, * * * must be disposed of some time" and that there was "[no] reason to believe [it could] be tried again by either side better or more exhaustively," balanced this language by cautioning that the verdict must reflect the decision of each individual member of the jury and that the jury was to reach a verdict only if each juror could do so without harm to his own individual judgment (Pet. App. C2, C4-C5). The court

further emphasized that each juror, majority as well as minority, should reexamine his views in light of the differing opinions of fellow jurors (*id.* at C3-C4). These instructions, while reminding the jury of its task to reach a verdict if possible, were ample protection against the danger that it would perceive the court's charge as requiring a guilty verdict. See *United States* v. *Dyba*, 554 F.2d 417, 420-421 (10th Cir.), cert. denied, 434 U.S. 830 (1977); *United States* v. *Cheramie*, *supra*, 520 F.2d at 331; *Munroe* v. *United States*, 424 F.2d 243, 245-247 (10th Cir. 1970).[7]

Moreover, following the supplemental charge, the jury was excused from further deliberations during a four day recess. Upon reconvening, the jury did not rush to agreement, but returned its verdict after nearly two additional days of deliberations. These circumstances, along with the jury's acquittal of petitioner Block on two of the nine counts submitted to

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[7] Petitioner Lichtig to the contrary notwithstanding (72-284 Pet. 10), the record does not show that the trial judge knew how the jury was divided at the time he gave the supplemental instruction. In any case, such knowledge would not have precluded him from giving the instruction. See *United States* v. *Jennings*, 471 F.2d 1310, 1314 (2d Cir.), cert. denied, 411 U.S. 935 (1973); *Bowen* v. *United States*, 153 F.2d 747, 751-752 (8th Cir.), cert. denied, 328 U.S. 835 (1946). Moreover, the cases relied upon by petitioner do not advance his cause. Those cases involved a specific inquiry by the court as to the jury's division, plus a disapproved supplemental instruction or other combination of circumstances indicating that the verdict may have been coerced. As noted, none of these factors is present here.

the jury against him, reflects substantial discussion among the jurors on each aspect of the case rather than hasty and coerced agreement.[8]

3. Finally, petitioners Weiner and Block claim that the district court erred in refusing to grant a new trial based upon juror declarations impeaching the unanimity of the verdict (78-281 Pet. 12-18). This claim does not merit review.

When the jury returned its verdict and the verdicts were read in open court, the jury was polled (61 Tr. 5286-5288). The clerk stated to the jury (*id.* at 5286):

[8] Petitioners note that there is an apparent conflict among the courts of appeals concerning the traditional *Allen* charge. Four courts of appeals, in the exercise of their supervisory power, have directed that the *Allen* charge not be given except in a substantially modified form. See *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *Government of the Virgin Islands* v. *Hernandez*, 476 F.2d 791 (3d Cir. 1973); *United States* v. *Angiulo*, 485 F.2d 37 (1st Cir. 1973); *United States* v. *Chaney*, 559 F.2d 1094 (7th Cir. 1977). The Ninth Circuit continues to approve the more traditional *Allen* type charge. See, *e.g.*, *United States* v. *Seawell*, 550 F.2d 1159 (9th Cir. 1977). More importantly, no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. And all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict. The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. *E.g.*, *Carter* v. *United States*, cert. denied, No. 77-1326 (June 12, 1978); *Dyba* v. *United States*, cert. denied, 434 U.S. 830 (1977); *Perez-Vega* v. *United States*, cert. denied, 424 U.S. 970 (1976); *Lee* v. *United States*, cert. denied, 422 U.S. 1044 (1975).

> Now, ladies and gentlemen, as I call your names please indicate by answering if the verdicts just read are your verdicts.

The clerk then called out each juror's name and each juror, including Krueger, the fifth juror, answered unequivocally in the affirmative (*id.* at 5286-5288). No objection was made to the form or manner of the polling (*ibid.*). No juror tried to modify his or her response at any time prior to entry of the verdict and discharge of the jury (*ibid.*).

Petitioners Weiner and Block now claim, however, that they deserve a new trial because, during jury deliberations, juror Krueger voted "guilty with reservations," and therefore no unanimous guilty verdict was returned. The true verdict, of course, is the verdict returned by the jury in open court and not the tentative ballots taken in the jury room. *Fox* v. *United States*, 417 F. 2d 84, 89 n.5 (5th Cir. 1969). It has thus long been established that a verdict may not be set aside merely because it is inconsistent with previous ballots of the jury. Otherwise few convictions would ever survive. *Hyde* v. *United States*, 225 U.S. 347, 384 (1912); *McDonald* v. *Pless*, 238 U.S. 264, 267-268 (1915); cf. Fed. R. Evid. 606(b).[9]

[9] Fed. R. Evid. 606(b) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to

It may be that when a juror fails to concur or stands mute during the jury polling, the verdict must be set aside. *Fox* v. *United States*, *supra*, 417 F. 2d at 89; *Castleberry* v. *NRM Corp.*, 470 F. 2d 1113, 1118 (10th Cir. 1972). In the instant case, however, no such event occurred. The record shows that the verdict was read in open court, in the presence of the jury, that each juror was asked whether he or she joined in the verdicts as read, that each juror unequivocally affirmed the verdicts as read, that juror Krueger, as the fifth juror, made no attempt during the polling of the last seven jurors or prior to discharge of the jury to modify her affirmation of the verdicts, that no objection was made to the manner in which the polling was conducted, and that upon completion of the polling the verdict was accepted and the jury was discharged. Therefore, unlike the *Fox* case, where one of the jurors stood mute when asked whether she affirmed the verdict, in the present case all 12 jurors unequivocally concurred in the verdicts of guilt.

The petitioners are thus left to argue that the juror in question was confused when she stated unequivocally that she agreed with the verdicts and that she

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or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

had really meant to vote "not guilty." The alleged basis for the confusion is that the juror, when asked individually whether the verdicts were "your" verdicts may have construed the question as possibly asking whether the verdicts were those of the "jury" rather than her own personal views (Pet. App. D).

The plain language of the clerk's question and the individual polling of each juror, however, leave little doubt that the inquiry was directed to the personal views of each juror rather than to those of the jury as a whole. That juror Krueger understood the question in its plain sense is further demonstrated by her affirmative response, for even if she had somehow understood the inquiry to be merely whether the verdicts were those of the jury as a whole, she would have, given the repeated instructions that the jury's verdicts must be unanimous, replied negatively, not affirmatively as she did. The absence of any objections to any ambiguity in the polling process and the failure of juror Krueger to modify her unequivocal affirmation of the verdicts during the remainder of the polling or prior to discharge of the jury further demonstrate that these convictions did not result from confusion in the polling process. Petitioners seek to avoid these problems by arguing that juror Krueger was simply so surprised at the form of the question that she replied affirmatively and was thereafter unable to speak (Pet. App. D). Since she was the fifth juror polled and not the first, and since she made no attempt to modify her statement at any time prior to discharge, it is nothing more than conjecture

and speculation to suppose that she was so surprised that she could speak only in the affirmative and say nothing more.

Petitioners have cited no authority holding that, once verdicts are read in open court and are unequivocally and individually affirmed by each juror without any objection as to the manner of polling and without any attempt by any juror to modify his responses prior to discharge, a new trial is required when a juror later claims, after consultation with defense counsel, not to have really intended to concur in the verdict. Such repudiations are strictly prohibited by the long-established rule that, with the presently immaterial exception of demonstrating extraneous influence on the jury, a juror, once discharged, may not impeach his or her own verdict.[10]

[10] The cases cited by petitioners do not support their position. In *Mattox* v. *United States*, 146 U.S. 140, 148 (1892), consistent with the exception to the rule noted above, juror testimony was properly received to show that newspaper comments on a pending capital case had been read by the jurors. Here, in contrast, there was no claim of such extraneous influence on the jury. *United States* v. *Reid*, 53 U.S. (12 How.) 361, 366 (1851), held that a new trial was properly denied in the face of juror affidavits stating that they had read newspaper accounts of the trial during their deliberations, where the accounts read were not prejudicial. Similarly, the facts here are different from those in *Freid* v. *McGrath*, 135 F.2d 833, 834 (D.C. Cir. 1943), where the jury as a whole mistakenly reported an incorrect verdict. Finally, *Jorgensen* v. *York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir. 1947), merely assumed that juror affidavits may be competent to show that the verdict was "impeachable" due to extraneous influence and is, therefore, consistent with the case at bar. The court held that no new trial was warranted. *Felton* v. *Spiro*, 78 F. 576 (6th Cir. 1897), in no way even touched upon the question of impeaching jurors' verdicts. Rather, the holding and discussion concerned the power of the trial judge to grant a new trial when the weight of the evidence was against the verdict.

McDonald v. *Pless*, *supra*, 238 U.S. at 267-269; *United States* v. *Eagle*, 539 F. 2d 1166, 1170 (8th Cir. 1976), cert. denied, 429 U.S. 1110 (1977); *Government of the Virgin Islands* v. *Gereau*, 523 F. 2d 140, 148-149 (3d Cir. 1975), cert. denied, 424 U.S. 917 (1976). The district court and the court of appeals correctly applied this long-standing rule. Since there was no claim that the verdict was improperly influenced by extraneous factors, the decision below was clearly correct.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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